

Louisiana Law Review

Volume 39 | Number 2

Community Property Symposium

Winter 1979

Background of Matrimonial Regimes Revision

Katherine S. Spaht

Repository Citation

Katherine S. Spaht, *Background of Matrimonial Regimes Revision*, 39 La. L. Rev. (1979)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol39/iss2/2>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

BACKGROUND OF MATRIMONIAL REGIMES REVISION*

Katherine S. Spaht**

EARLY ROLE OF LOUISIANA STATE LAW INSTITUTE

By Act 166 of the legislature of 1938, the Louisiana State Law Institute was chartered as an official law revision commission and law reform and legal research agency of the state.¹ Officially charged by statute, the Law Institute is "[t]o examine and study the civil law of Louisiana and the Louisiana jurisprudence and statutes of the state with a view of discovering defects and inequities and of recommending needed reforms,"² and "[t]o recommend from time to time such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of the state both civil and criminal, into harmony with modern conditions."³

In 1948 the Institute was directed by the legislature to prepare a projet for revising the Louisiana Civil Code,⁴ the last complete revision having been completed in 1825. Unfortunately, however, the legislature did not appropriate a sufficient amount of money to insure that such a monumental task would be undertaken. Not until 1961 did the Institute establish a Civil Law Section whose ultimate objective was to "accomplish the general purposes of the Institute in the field of the civil law of Louisiana."⁵ Even more specifically an enumerated duty of the Civil Law Section was "[t]o prepare the groundwork for the revision of the Civil Code of Louisiana."⁶

* For the text of Act 627 see the appendix to this symposium at 559.

** Associate Professor of Law, Louisiana State University; Member of Advisory Committee to Joint Legislative Subcommittee Revising Louisiana's Community Property Laws.

1. 1938 La. Acts, No. 166, § 1, codified in LA. R.S. 24:201 (1950).

2. LA. R.S. 24:204(2) (1950).

3. LA. R.S. 24:204(5) (1950).

4. 1948 La. Acts, No. 335.

5. By-Laws of the Louisiana State Law Institute III(A)(1). The section's "ultimate" objectives were to produce a planned civil law doctrine and prepare a *projet* or *projets* for the eventual revision or reformation of the *Louisiana Civil Code*. LOUISIANA STATE LAW INSTITUTE, LOUISIANA STATE LAW INSTITUTE HANDBOOK 29 (1977).

6. By-Laws of the Louisiana State Law Institute III(A)1(e).

In the early 1970's the Institute received numerous requests for the creation of a committee to study the matrimonial regimes law of Louisiana and make recommendations for its revision. Presumably, the particular interest in matrimonial regimes law revision was precipitated by the United States Supreme Court decision in *Reed v. Reed*.⁷

In *Reed* the Court held that an Idaho probate statute⁸ providing for the appointment of an administrator and containing a mandatory provision preferring men over women in the same entitlement class, was an unconstitutional violation of the equal protection clause of the fourteenth amendment. The impact of *Reed* was not its holding as to the unconstitutionality of the Idaho statutory provision,⁹ but rather the equal protection analysis applied to statutory classifications drawn on the basis of sex. Under the equal protection clause, the Court recognized that states do have the power to treat different classes of persons in different ways.¹⁰ However, the fourteenth amendment does "deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."¹¹ The difference in treatment must have a "fair and substantial relation to the object of the legislation,"¹² but in *Reed* the justification for the difference in treatment of the sexes, and the objective of the legislation, was that of "reducing the workload on probate courts by eliminating one class of contests."¹³ A mandatory preference on the basis of sex "merely to accomplish the elimination of hearings on the merits . . ."¹⁴ is a denial of equal protection.

In response to the *Reed* decision and the consequent re-

7. 404 U.S. 71 (1971).

8. IDAHO CODE §§ 15-312 and 15-314.

9. *Id.*

10. "In applying [the Equal Protection Clause of the fourteenth amendment], this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways." 404 U.S. at 75.

11. *Id.* at 75-76.

12. *Id.*

13. *Id.*

14. *Id.*

quests, the Executive Committee of the Institute appointed Professor Janet Mary Riley of Loyola University Law School to serve as Reporter for revision of Civil Code book III, title VI. To assist Professor Riley in her undertaking, an advisory committee was created consisting of Senator Thomas A. Casey, Katherine Brash Jeter, Helen Kohlman, Thomas B. Lehmann, Max Nathan, Robert A. Pascal, Eric O. Person, Robert Roberts, III, and Wayne S. Woody. From 1973 until late 1976, the Committee met and considered various alternatives. Throughout this period the Reporter also sought direction from the Council of the Law Institute as to the policy it desired implemented by the legislation. Reports of the Committee on its progress were submitted periodically to the Council. The Reporter favored equal powers of management of community property; the members of the Advisory Committee were divided as to the direction revision should take; and the Council appeared to favor a system "whereby each spouse would exercise control over his or her own earnings."¹⁵

1974 CONSTITUTION

Paralleling Law Institute involvement in the revision of Louisiana matrimonial regimes law was the enactment of the Louisiana Constitution of 1974. Article I, section 3, provides: "No law shall arbitrarily, capriciously or unreasonably discriminate against a person because of . . . sex" ¹⁶ In interpreting this constitutional guarantee, the Louisiana Supreme Court stated, "[L]egislative classifications [in order to satisfy equal protection] must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike."¹⁷

15. LOUISIANA STATE LAW INSTITUTE, *supra* note 5, at 31.

16. LA. CONST. art. I, § 3.

17. *State v. Barton*, 315 So. 2d 289, 292 (La. 1975). The husband argued that LA. R.S. 14:74(1) (1950), imposing criminal responsibility upon husbands who refuse to support their wives, was unconstitutional under article I, section 3. The court, however, responded:

While it is true that, as noted above, more and more women are abandoning the traditional role of homemaker in favor of commercial employment, the fact remains that, at present, the husband is still invariably the dominant or only

As much as three years after enactment of the constitution, legislative statutes and jurisprudential rules containing classification based upon sex consistently were held constitutional under article I, section 3. In each case the court found that the classification drawn by the statute was reasonable, not arbitrary, and rested upon some difference having a fair and substantial relation to the object of the legislation. For example, in *Williams v. Williams*¹⁸ the Louisiana Supreme Court held that article 148 of the Civil Code making alimony available only for the wife pending suit for separation or divorce had a rational basis: "Because of the wife's lack of control over her own earnings . . . and the revenues from the community and her separate property . . . we believe that it was reasonable for the legislature to seek to afford her special protection during the final (and often nonamicable) stage of the community's existence."¹⁹ Also representative of the decisions is *Broussard v. Broussard*,²⁰ in which the Third Circuit Court of Appeal, in dicta, concluded that there was a rational basis for the jurisprudential maternal preference rule in child custody cases: "The preference is based on the simple fact that the day-to-day care of minor children has traditionally, in our society, been in the hands of mother . . . ,"²¹ and "[i]n addition, there is an obvious biological connexity between mother and child in that the mother carries the child during gestation, gives birth to it, and suckles it (in some cases) during infancy."²²

means of support for a couple. In achieving the legitimate state objective of protecting the welfare of citizens of this state prohibiting the desertion or intentional nonsupport of a wife by a husband, the statute similarly treats the vast majority of all those similarly situated. Thus, although the classification thus drawn may be under-inclusive of all supporters of spouses, as drawn it demonstrates a rational relation between the classification of supporters of spouses as male and the achievement of a legitimate legislative objective.

315 So. 2d at 292.

18. 331 So. 2d 438 (La. 1976).

19. *Id.* at 441.

20. 320 So. 2d 236 (La. App. 3d Cir. 1975).

21. *Id.* at 238.

22. *Id.* The court added, "A relationship is created which gives, in our opinion, a biological basis for the historic legal preference given the mother in questions of custody." *Id.*

UNITED STATES SUPREME COURT DECISIONS

After *Reed* and between the years 1973 and 1976, the United States Supreme Court rendered several sex discrimination decisions which were carefully examined for guidance on the issue of what constitutes a rational basis for sex-based classifications. One of the first such decisions was *Frontiero v. Richardson*,²³ which involved the issue of whether a female member of the armed services had the right to claim her spouse as a dependent without proof that he was in fact dependent on her for one one-half of his support. Male members of the service could claim their wives as dependents without such proof under the statutory scheme. In deciding that such differential treatment violated the due process clause of the fifth amendment, the Court concluded that the sole purpose of the statute was "administrative convenience" based upon empirical data that "the husband in our society is generally the 'breadwinner' in the family—and the wife typically the 'dependent' partner"²⁴

Two years after *Frontiero*, a statutory scheme which provided social security benefits to a surviving widow but not to a widower²⁵ was challenged as violative of the due process clause of the fifth amendment. In *Weinberger v. Wiesenfeld*²⁶ the Court found the generalization "that male workers' earnings are vital to the support of their families, while the earnings of female wage-earners do not significantly contribute to their families' support"²⁷ archaic. Even though the majority recognized that there was some empirical support for the generalization, it found the statutory distinction overbroad and thus not to be tolerated by the constitution. Furthermore, in examining the purpose of the statute Justice Brennan emphasized the "actual" or "articulated" purpose as it emerged from the legislative history of the statute, rather than a "conceivable" or "hypothesized" one.²⁸ Despite the government's effort to justify

23. 411 U.S. 677 (1973).

24. *Id.* at 681.

25. 42 U.S.C. § 402(g) (1972).

26. 420 U.S. 636 (1975).

27. *Id.* at 643.

28. "This court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history

the classification as "benign,"²⁹ the Court found that the actual purpose was to permit women to elect not to work and to devote themselves to the care of children. Thus, "[g]iven the purpose of enabling the surviving parent to remain at home to care for a child, the gender-based distinction of §402(g) is entirely irrational."³⁰

Similarly, in 1977 the United States Supreme Court in *Califano v. Goldfarb*³¹ held unconstitutional a gender-based statutory classification which made payable certain survivors' benefits to widows, but not widowers, unless a widower had been receiving at least one-half of his support from his deceased wife. Relying upon the decisions in *Frontiero* and *Wiesenfeld* and the "actual" purpose of the statute, the Court concluded that "the differential treatment of nondependent widows and widowers results not . . . from a deliberate congressional intention to remedy the arguably greater needs of the former, but rather from an intention to aid the dependent spouses of deceased wage earners, coupled with a presumption that wives are usually dependent."³²

LAW INSTITUTE AD HOC COMMITTEE

Apparently monitoring the state and federal constitutional developments in the area of sex discrimination, the legislature communicated its expectation to the Institute that a proposal for reformation of Louisiana's community property system be presented at the 1977 session. In view of this expectation and the progress of the Institute Committee, the Council deemed it appropriate in late 1976 to create a second committee to complete the work begun by the first in time for presentation of a proposal at the 1977 session. Serving on the ad hoc committee were Judge Adrian Duplantier (Chairman), Jack C. Cald-

demonstrates that the asserted purpose could not have been a goal of the legislation." *Id.* at 648 n.16.

29. The government argued that the purpose was to compensate female beneficiaries as a group for the economic difficulties which still confront women who seek to support themselves and their families. G. GUNTHER, CONSTITUTIONAL LAW 776 (9th ed. 1975).

30. 420 U.S. at 651.

31. 430 U.S. 199 (1977).

32. *Id.* at 216-17.

well, Richard E. Gerard, Katherine B. Jeter, E. H. Lancaster, Jr., Carlos E. Lazarus, Frank W. Middleton, Jr., Wedon I. Smith, and Katherine S. Spaht. The work product of the ad hoc committee, approved by the Council of the Institute for presentation at the 1977 regular session, essentially retained the ownership features of community property "but gave each spouse control over his or her earnings."³³

JURISPRUDENTIAL DEVELOPMENT IN 1977

Early in 1977 *Kirchberg v. Feenstra*,³⁴ a federal district court decision, upheld the constitutionality of Civil Code article 2404, which designates the husband as head and master of the community. Relying on the rationale of *Labine v. Vincent*,³⁵ the court concluded that Louisiana's community property system which allowed the husband to mortgage the home without the wife's consent did not violate the equal protection and due process clauses of the fourteenth amendment. According to the court, the legal provisions regulating the management of community property presented no insurmountable barrier³⁶ to a wife who wished to exercise greater control over immovables. The community of acquets or gains could have been eliminated or modified by marriage contract;³⁷ thus, the spouses, presumed to know the law, "tacitly" contracted³⁸ the community or partnership of acquets or gains. Furthermore, the wife could

33. LOUISIANA STATE LAW INSTITUTE, *supra* note 5, at 31.

34. 430 F. Supp. 642 (E.D. La. 1977).

35. 401 U.S. 532 (1971).

36. "Similarly [to the facts in *Labine*], articles 2334 and 2404 did not present an insurmountable barrier to Ms. Feenstra had she wished to exercise greater control over the community immovables." 430 F. Supp. at 646.

37. LA. CIV. CODE arts. 2325-29.

38. The following quote from an article by Professor Pascal, *Updating Louisiana's Community of Gains*, 49 TUL. L. REV. 555, 555-56 (1975), appeared in the *Kirchberg* opinion:

The community of gains is "super-induced" by every marriage subject to Louisiana law *only if the spouses either have not entered into a marriage contract, or have entered into one which does not modify or reject that community regime*. This freedom to modify and reject the community of gains changed the character of that regime from one imposed by law to one essentially conventional. Thus, spouses must be deemed to have contracted tacitly the community of gains to the extent they have not contracted expressly against it.

430 F. Supp. at 647 (emphasis by the court).

have filed a declaration preventing the encumbrance without her consent of community immovables standing in the names of both spouses.³⁹

Five days later, in a case involving statutory discrimination against illegitimates,⁴⁰ the United States Supreme Court reconsidered its decision in *Labine v. Vincent*. Without specifically overruling *Labine*, the Court scrutinized the Illinois Probate Act⁴¹ more intensely than it had the Louisiana statute in *Labine*.⁴² Labelling the "insurmountable barrier" argument advanced by Illinois as "an analytical anomaly,"⁴³ the Court opined, "If the law cannot be sustained on this analysis [traditional equal protection analysis], it is not clear how it can be saved by the absence of an insurmountable barrier to inheritance under *other and hypothetical circumstances*."⁴⁴ The state argued that its statute mirrored "the presumed intentions of the citizens of the State regarding the disposition of their property at death."⁴⁵ The argument proceeded that the Court must assume that the deceased understood the method of disposition of his property under the Illinois Probate Act and that his failure to execute a will and provide otherwise demonstrated his approval of the provision. Finding it unnecessary to resolve the question of "whether presumed intent alone can ever justify discrimination against illegitimates,"⁴⁶ the Court,

39. LA. CIV. CODE art. 2334.

40. *Trimble v. Gordon*, 430 U.S. 762 (1977).

41. ILL. REV. STAT. ch. 3, § 12 (1973). See *Trimble v. Gordon*, 430 U.S. at 763 n.1.

42. The Court explained:

The Illinois statute can be distinguished in several respects from the Louisiana statute in *Labine*. The discrimination in *Labine* took a different form, suggesting different legislative objectives. . . . In its impact on the illegitimate children excluded from their parents' estates, the statute was significantly different. Under Louisiana law, all illegitimate children, "natural" and "bastard," were entitled to support from the estate of the deceased parent. . . . Despite these differences, it is apparent that we have examined the Illinois statute more critically than the Court examined the Louisiana statute in *Labine*. To the extent that our analysis in this case differs from that in *Labine*, the more recent analysis controls.

430 U.S. at 776 n.17.

43. *Id.* at 773.

44. *Id.* at 774 (emphasis added).

45. *Id.*

46. *Id.* at 775.

nonetheless, in a footnote in the opinion, expressed the following view:

Even if one assumed that a majority of the citizens of the State preferred to discriminate against their illegitimate children, the sentiment hardly would be unanimous. With respect to any individual, the argument of knowledge and approval of the state law is sheer fiction. The issue therefore becomes where the burden of inertia in writing a will is to fall. At least when the disadvantaged group has been a frequent target of discrimination, as illegitimates have, we doubt that a State constitutionally may place the burden on that group by invoking the theory of "presumed intent."⁴⁷

Obviously, the United States Supreme Court's scrutiny under the due process and equal protection clauses had changed significantly from *Labine* to *Trimble*, and the federal district court analysis in *Kirchberg*, which relied solely upon *Labine*, was at the very least suspect. Thus, the relevance of *Trimble* to the matrimonial regimes reform was to emphasize the vulnerability of the managerial scheme of Louisiana's community property system to successful constitutional attack.

1977 LEGISLATIVE SESSION

Although more than two bills incorporating a revision of Louisiana's community property laws were introduced at the 1977 session, interest focused on House Bill 783 by Representative Clark Gaudin (on recommendation of the Louisiana State Law Institute) and House Bill 1278 by Representatives A. J. McNamara and Diana Bajoie.

House Bill 783, the Law Institute proposal, can best be described as a reformation of the management features of community property in the form of a "two-fund system," similar to that adopted in Texas.⁴⁸ Under section 2841 of House Bill 783 each spouse had the exclusive right to administer, encumber or alienate things produced by his individual effort or skill.⁴⁹ Be-

47. *Id.* at 775 n.16.

48. TEX. FAM. CODE § 5.01-62 (Vernon) (1976).

49. La. H.B. No. 783, § 2841, 3d Reg. Sess. (1977). This section provided: "Except as otherwise provided in the following articles: A. Each spouse, without the

cause property earned by either spouse was classified as community,⁵⁰ two separate community funds were created with the respective powers of management and alienation placed in different spouses, hence its description as a "two-fund system." As to other community property, administrative powers depended upon in whose name the title to an immovable appeared⁵¹ or in whose name movables were registered.⁵² In the case of unregistered community movables, with one exception,⁵³ powers of administration were placed in the spouse having possession at the time of the transaction.⁵⁴ Other provisions of House Bill 783 were consistent with the philosophy underlying a "two-fund system"—i.e., enforcement of obligations;⁵⁵

consent or concurrence of the other, has the right to possession of and to administer, encumber, or alienate the things produced by his individual effort, skill, or industry"

50. La. H.B. No. 783, § 2840, 3d Reg. Sess. (1977). Section 2840 provided: "Community property includes: (1) Things earned or resulting from the effort, skill, or industry of either spouse during the existence of a community regime"

51. La. H.B. No. 783, § 2842, 3d Reg. Sess. (1977). Section 2842 provided: "Each spouse, without the consent or concurrence of the other, may administer, encumber, or alienate a community immovable, when the title thereto is in his name individually. The consent or concurrence of both spouses is necessary to administer, encumber, or alienate a community immovable when the title thereto is in the names of the spouses jointly."

52. La. H.B. No. 783, §§ 2843-44, 3d Reg. Sess. (1977). Section 2843 provided:

Each spouse, without the consent or concurrence of the other, may administer, encumber, or alienate a community corporeal movable the title registration of which is provided by law, when the title thereto is registered in his name or in the names of the spouses in the alternative. The consent or concurrence of both spouses is necessary to administer, encumber, or alienate such a movable when the title thereto is in the names of the spouses jointly.

Section 2844 provided:

Each spouse, without the consent or concurrence of the other, may administer, encumber, or alienate a community incorporeal movable issued or registered in his name or in the names of the spouses in the alternative. The consent or concurrence of both spouses is necessary to administer, encumber, or alienate a community incorporeal movable issued or registered in the names of the spouses jointly.

53. La. H.B. No. 783, § 2845, 3d Reg. Sess. (1977). Section 2845 provided in part: "The consent or concurrence of both spouses is necessary to encumber or alienate the community furnishings contained in the family residence."

54. *Id.* Section 2845 also stated: "A community corporeal movable the title to which is not registered, and a community incorporeal movable not issued or registered in the name of either or both spouses, may be administered, encumbered, or alienated by the spouse having the possession thereof at the time of the transaction."

55. La. H.B. No. 783, § 2847, 3d Reg. Sess. (1977). Section 2847 stated:

During the existence of the community regime, an obligation of a spouse,

accounting between the spouses upon dissolution;⁵⁶ and acceptance,⁵⁷ acceptance with benefit of inventory,⁵⁸ or renunciation

whether arising before or during the regime, may be enforced only against the separate property of that spouse, the community property under the sole administration of that spouse, and, with respect to jointly administered property, the portion administered by that spouse.

56. La. H.B. No. 783, §§ 2849-52, 3d Reg. Sess. (1977). Section 2849 provided:

Upon dissolution of the community, each spouse shall render to the other an accounting setting forth both his separate property and the community property that was under his administration, the unpaid separate liabilities of the spouse, unpaid solidary liabilities, and the unpaid liabilities incurred by him for the common interest of the spouses.

All liabilities incurred by a spouse during a community regime are presumed to have been incurred for the common interest of the spouses.

Section 2850 provided:

If community property has been used to satisfy a separate debt of one of the spouses, that spouse shall reimburse the other spouse, upon the dissolution of the community, for one-half of the community property so used.

If the separate property of one spouse has been used to satisfy a debt incurred for the common interest of the spouses, the spouse whose property has been used shall be reimbursed by the other spouse for one-half of such property.

Section 2851 provided:

Upon the dissolution of a community regime, if the separate property of one spouse has increased in value and such increase is attributable to the uncompensated labor or industry of either spouse, the spouse whose separate property has thus increased in value shall pay to the other spouse one-half of the increase.

Section 2852 provided:

Upon the dissolution of a community regime, if the separate property of one spouse has increased in value and such increase is attributable to an investment of community property, the spouse whose separate property has thus increased in value shall pay to the other spouse an amount equal to one-half of the value of the increase, not to exceed, however, one-half of the amount of the community investment.

If community property has increased in value as a result of an investment of the separate property of one spouse, the spouse whose property has been used shall be reimbursed by the other spouse for one-half the value of the increase, not to exceed one-half the amount of the property so invested.

57. La. H.B. No. 783, § 2854, 3d Reg. Sess. (1977). Section 2854 stated: "A spouse who accepts simply is personally bound for his portion of the debts incurred by the other spouse for the common interest of the spouses."

58. La. H.B. No. 783, §§ 2858, 2860, 3d Reg. Sess. (1977). Section 2858 stated: "A spouse who accepts under benefit of inventory is liable for the debts incurred by the other spouse for the common interest of the spouses only to the value of his portion of the property which was under the administration of the other spouse."

Section 2860 stated:

In order to accept with benefit of inventory, a spouse shall petition the court for the appointment of a notary public to make an inventory of the community property under the administration of the other spouse, showing the value thereof as determined by the notary public. The inventory shall also list the unpaid debts incurred by the other spouse for the common interest of the spouses.

of the community.⁵⁹

In contrast, House Bill 1278 provided for a "one-fund system." As between the spouses, this proposal with some notable exceptions,⁶⁰ adopted in principle the right of either spouse to manage, control and dispose of community property.⁶¹ However, one provision required joinder for certain transactions,⁶² and another article empowered one spouse to the exclusion of the other to manage, control, and dispose of certain community property.⁶³ A separate section of the bill regulated powers of administration of community property as to third parties.⁶⁴

59. La. H.B. No. 783, §§ 2855-57, 3d Reg. Sess. (1977). Section 2855 provided: "A spouse who renounces loses all his right in community property under the administration of the other spouse and is exonerated from liability for debts for which the other spouse is responsible and for which the renouncing spouse is not otherwise responsible."

Section 2856 stated: "The renunciation does not affect the undivided interest of the renouncing spouse in the community property under his administration, nor does it exonerate him from liability for debts incurred by him."

Section 2857 provided: "A creditor of a spouse who is prejudiced by the renunciation may accept to the extent of his interest in the manner provided for acceptance of a succession by a creditor."

60. La. H.B. No. 1278, §§ 2352.1, 2353, 3d Reg. Sess. (1977). Section 2352.1 provided:

A spouse who operates or manages a business or an interest in a business, which is community movable property, has the right to manage, control and dispose of the business or the interest in the business, subject to the standard of prudent administration required of a person in a fiduciary capacity.

Section 2353 provided:

Joinder of both spouses is required for alienation, encumbrance, or lease of the following community assets:

- (1) Any immovable property;
- (2) Furniture or furnishings in the family home and in use by the family;
- (3) Movable that by their nature are for the personal use of the other spouse;

- (4) Movable registered in the names of both spouses; and

- (5) Substantial assets of the community by gratuitous inter vivos donation, that is, a donation wherein there is no direct material advantage to the spouses or to their community; joinder is not required for customary donations of a value usual to the economic status of the spouses at the time the donation is made.

61. La. H.B. No. 1278, § 2352, 3d Reg. Sess. (1977). Section 2352 provided: "Each spouse has the right to manage, control, and dispose of community property, except where specifically provided otherwise."

62. La. H.B. No. 1278, § 2353, 3d Reg. Sess. (1977). For the text of this section, see note 60, *supra*.

63. La. H.B. No. 1278, § 2352.1, 3d Reg. Sess. (1977). For the text of this section, see note 60, *supra*.

64. La. H.B. No. 1278, §§ 2357-60, 3d Reg. Sess. (1977). Section 2357 provided:

Both bills were referred to the House Committee on Civil Law and Procedure. After a hearing the House Committee took no action on House Bill 783 but reported favorably on House Bill 1278. Simultaneously, Senator Thomas Casey introduced Senate Concurrent Resolution 54, creating a joint legislative subcommittee, composed of five senators from the Senate Committee on Judiciary, Section "A," and five representatives from the House Committee on Civil Law and Procedure, to draft a proposed bill revising Louisiana's community property laws. The resolution reflected legislative concern that such a significant change in the law should be made only after careful deliberation. In the opinion of some legislators more time was needed to assess the implications of such a reform.

To assist the Joint Legislative Subcommittee, an Advisory Committee of six persons was to be appointed. One man and one woman were to be chosen by the president of the Louisiana State Bar Association. In addition, the dean of each law school in the state was to submit the names of one man and one woman, and the Speaker of the House of Representatives and the President of the Senate were each to select one man and one woman from this list.

When the resolution was introduced in the House, it was amended to direct the Subcommittee to draft a proposal "to implement the concept of equal management of community property." Furthermore, the resolution directed that "in order to accomplish the purposes of this Resolution, [the proposed bill] shall include a provision to the effect that each spouse shall have the right to manage, control, and dispose of community property, except where specifically provided otherwise

"A third party may rely on a spouse's power to alienate, encumber, or lease movable property registered in the name of that spouse alone."

Section 2358 stated:

A third party in good faith may rely on one spouse's power to alienate, encumber, or lease movable property not subject to registration if it is in that spouse's possession and is not community furniture or furnishings in the family home and in use by the family or by its nature for the personal use of the other spouse.

Section 2359 stated: "Joinder of both spouses is required for the alienation, encumbrance, or lease of community immovables unless a declaration to the contrary has been recorded."

Section 2360 provided: "A transaction between one spouse and a third person not entitled to rely on that spouse's power as delineated in Articles 2357 through 2359 is null as to the non-contracting spouse's one-half interest in the property alienated."

in the proposed bill."

Senate Concurrent Resolution 54, as amended, passed the House of Representatives. As a result, no action was taken on House Bill 1278.

JOINT LEGISLATIVE SUBCOMMITTEE

In October, 1977, the following appointments were made to the Subcommittee created by Senate Concurrent Resolution 54: Senators Joseph Tiemann, Jesse Knowles, Claude Duval, Jackson Davis and Thomas Casey (Chairman) and Representatives Sam LeBlanc, Frank Simoneaux (Vice-chairman), A. J. McNamara, Clark Gaudin and Manuel Fernandez. Jack C. Caldwell and Katherine Brash Jeter were appointed by the president of the Louisiana Bar Association to serve on the Advisory Committee. From the nominees submitted by the four law schools in the state, the following were chosen to serve on the Advisory Committee: Southern University, Raymond Simmons; Tulane University, Cynthia Samuels; Loyola University, George Bilbe; and Louisiana State University, Katherine Spaht.

At the first scheduled meeting of the Joint Legislative Subcommittee and Advisory Committee, it was decided that the Advisory Committee should draft policy alternatives for consideration by the Joint Legislative Subcommittee. The responsibility of the Advisory Committee then would be to draft legislation implementing the policy choices made by the Subcommittee. In addition, the Law Institute offered the services of one of its staff members, Evelyn Brooks, who had been assigned research responsibilities when the Institute was considering its community property reform proposal. The first policy decision made by the Subcommittee, in accordance with the language of Concurrent Resolution 54, was to adopt in principle an "equal management" concept of community property. Thereafter, all policy alternatives to be considered were to be consistent with the underlying philosophy of equal management.

JURISPRUDENTIAL DEVELOPMENTS—1978

During the period of time in which the Advisory Commit-

tee and Joint Legislative Subcommittee were working feverishly on an "equal management" reform proposal, several Louisiana decisions of significance were rendered affecting sex discrimination and Louisiana's community property system. In *Loyacano v. Loyacano*,⁶⁵ Justice Dennis, on original hearing, concluded that if article 160 of the Civil Code only allowed divorced wives to claim alimony, then the statute would be an unconstitutional denial of equal protection of the laws under article I, section 3, of the 1974 Louisiana Constitution:

Although not based solely on sex, such classifications for purposes of entitlement to alimony after divorce probably were founded on the assumption that all former husbands have sufficient means for their support, or that few divorced women have property and earnings out of which alimony could be paid, or upon both. If these propositions were ever true, common experience tells us that the deviations from them are now too numerous for the classifications to withstand equal protection challenge.⁶⁶

Yet, Justice Dennis found that since Louisiana is a civil law jurisdiction, "the absence of express law does not imply a lack of authority for courts to provide relief."⁶⁷ Relying on Civil Code article 21 and the underlying policy of article 160,⁶⁸ Justice Dennis concluded that "a Louisiana court may allow alimony to a husband after divorce, under the same circumstances in which it can be claimed by the wife, and that the contention of the defendant-respondent that Civil Code article 160 denies equal protection of the law is without merit."⁶⁹

In two court of appeal decisions that immediately followed *Loyacano*, provisions of Louisiana's community property sys-

65. 358 So. 2d 304 (La. 1978).

66. *Id.* at 307.

67. *Id.*

68. "The general policy consideration and practical reason which appear to have induced the legislature to provide alimony after divorce was to prevent divorced women without sufficient means from becoming wards of the state." *Id.* at 308.

"Our appeal to natural law and reason informs us that the general policy considerations which induced the legislature to authorize alimony allowances for wives after divorce would also be served by granting such support to either spouse when the circumstances provided by Article 160 prevail." *Id.* at 309.

69. *Id.* at 309.

tem were challenged as unconstitutional under article I, section 3. In one case, after examination of the two policy bases for the "double declaration" requirement of the husband,⁷⁰ the First Circuit concluded there was no rational justification for its imposition. However, the court felt bound by the Louisiana Supreme Court's denial of writs in *Barnett v. Barnett*,⁷¹ in which the constitutionality of the "double declaration" rule was sustained. In *Burger v. Burger*,⁷² the husband argued that article 2334 of the Civil Code, which provides that the wife's earnings when living separate and apart are her separate property, was unconstitutional. The wife was seeking discovery as to the salary of the husband for the five-year period during which they lived separate and apart. Relying on the Louisiana Supreme Court decision of *McMichael v. McMichael*,⁷³ the Fourth Circuit held that the husband had to account for bonuses received during this period, but not for his regular salary. Only if there were "effects" (or property) at dissolution attributable to these bonuses and the wife sought a partition would the constitutional issue be properly raised, according to the court. In such a case, the court postulated that the supreme court might use extensive interpretation as it had done in *Loyacano* and concluded that the principle of article 2334 is that "the spouse . . . who no longer shares a community life should not be obliged to divide his or her earnings with the other spouse."⁷⁴

By far the most significant case and the one which received the most media attention was *Corpus Christi Parish Credit Union v. Martin*.⁷⁵ There the husband had executed a mortgage on the family home to secure an indebtedness contracted for the benefit of his mother. Being the sole wage earner in the Martin family, the wife appeared at the credit union and ob-

70. *Phillips v. Nereaux*, 357 So. 2d 813, 819-21 (La. App. 1st Cir. 1978). The two policy reasons traditionally advanced for imposing the "double declaration" requirement have been notice to third parties by recordation in the public records and the "floating title" theory.

71. 339 So. 2d 495 (La. App. 2d Cir. 1976), *cert. denied*, 341 So. 2d 1127 (La. 1977).

72. 357 So. 2d 1178 (La. App. 4th Cir. 1978).

73. 251 La. 654, 205 So. 2d 433 (1967), *cert. denied*, 393 U.S. 871 (1968).

74. 357 So. 2d 1178, 1181 (La. App. 4th Cir. 1978).

75. 358 So. 2d 295 (La. 1978).

jected to the transaction; the response was that there was nothing she could do. Apparently, the transaction resulted in the ultimate termination of the Martin marriage. When the husband defaulted on the promissory note, the credit union sought to foreclose by executory process on the mortgage. The wife sought an injunction claiming that Civil Code articles 2334 and 2404, which permit the husband to bind the community property without the wife's consent, are unconstitutional under the fourteenth amendment of the United States Constitution. The district judge concluded that Civil Code article 2404, designating the husband as "head and master" of the community, was unconstitutional under the equal protection clause of the fourteenth amendment.

Exactly one week before the legislature convened for the 1978 session, the Louisiana Supreme Court in a four to three decision reversed the trial court in *Martin* and held that the case could have been decided without determining the constitutionality of Louisiana's community property managerial system:

Since the statutes have provided a simple and efficient method for Selina Martin to prevent her husband's mortgaging the family home, and since a determination of the constitutionality of the Louisiana community property system concerns the basis of property ownership and real rights in Louisiana, this court should avoid deciding the case on a constitutional basis unless a decision on the constitutional question is essential to a decision of the issues.⁷⁶

The dissent authored by Justice Tate was as important as the majority opinion. According to the dissent, article 2404 of the Civil Code is obviously unconstitutional.⁷⁷ Justice Tate surmised that the majority, in view of legislative attention to the problem, wished to avoid disruption in dealing with community-held property. To avoid the inherent problems of declaring article 2404 unconstitutional, Justice Tate suggested

76. *Id.* at 298.

77. *Id.* at 302 (Tate, J., dissenting).

prospective application of the declaration of unconstitutionality:

Since the legislature will soon convene for its 1978 annual session, our declaration of unconstitutionality would not take effect until the effective date provided by any laws enacted by this session . . . which regulate the administration, sale, mortgage, or other transaction by the spouses with regard to property acquired by the community.

If the legislature during the session fails to enact legislation purporting to end the unconstitutionality of Articles 2334 and 2404 . . . then as of the sixtieth day after final adjournment of this session . . . we would hold Civil Code Articles 2334 and 2404 are invalidated as unconstitutional, insofar as permitting the husband alone to sell, mortgage, or lease community immovable property of which the title is in the name of both spouses.⁷⁸

Thus, the stage was set for the 1978 session of the legislature and its consideration of the work product of the Joint Legislative Subcommittee, House Bill 1132.

1978 LEGISLATIVE SESSION

As originally introduced, the Subcommittee's "equal management" bill was somewhat different from the final version contained in Act 627. In May, after House Bill 1132 had been referred to the House Committee on Civil Law and Procedure, it was redrafted merely in an attempt to make its language more consistent with that of the Louisiana Civil Code. Substantively, there was intended to be no change in the original work product of the Subcommittee. Both the original version and the redraft contained the essential features which appear in Act 627.

As to management of community property, the Act adopts as a basic principle the ability of either husband or wife to administer, encumber, and alienate community property. To this basic principle, however, there are two general categories of exceptions: instances of joint management (consent of both

78. *Id.* at 303-04 (Tate, J., dissenting).

husband and wife is necessary) and instances of sole and exclusive management (one spouse has exclusive management of community property).

Because certain transactions are felt to be of such importance to the well-being of the family, the Act requires concurrence of the spouses for those transactions.⁷⁹ By amendment on the House floor, Act 627 provides a method for obtaining in advance consent for two of the transactions which require concurrence: "A spouse may expressly confer upon the other spouse the sole and irrevocable right to alienate, encumber, or lease a community immovable or a community business or all or substantially all of the assets of a community business."⁸⁰ As explained in the comment, "[t]he right conferred may be irrevocable although no consideration is given"; and "[t]he right conferred and the revocability of the right may be of unlimited duration, for a definite period of time, or until the happening of an uncertain or certain event."

In order to facilitate commerce, the legislature felt that as another exception to the basic principle of "equal management," certain community property should be managed exclusively by one spouse. In Act 627 there are three instances of sole and exclusive management of community property: (1) alienation and encumbrance of the movable assets of a business managed by one spouse "without the participation in management

79. LA. R.S. 9:2843 (Supp. 1978):

The alienation, encumbrance or lease of the following property, except encumbrances created by operation of law, requires the concurrence of the spouses:

- (1) Community immovables;
- (2) Community furniture or furnishings in use in the family home;
- (3) A community business or all or substantially all of the assets of the business;
- (4) Movable when issued to or when registered as provided by law in the names of the spouses jointly.

The concurrence of the spouses is also necessary for the donation of community assets, except in cases of usual or customary gifts of a value commensurate with the economic status of the spouses at the time of the donation.

80. *Id.* At the Subcommittee hearing held September 6, 1978, the Advisory Committee suggested that this provision of Act 627 be amended at the 1979 session of the legislature to read as follows: "A spouse may expressly and irrevocably waive the necessity for concurrence to the alienation, encumbrance or lease of a community immovable or a community business or all or substantially all of the assets of a community business."

of the other";⁸¹ (2) alienation and encumbrance of movables issued or registered in the name of one spouse;⁸² and (3) by amendment on the House floor, alienation and encumbrance, by a spouse who is a partner, of the accompanying partnership interest.⁸³

Under Act 627, remedies do exist if the power to alienate or encumber community property is abused. One spouse is liable to the other for fraud or bad faith in the management of community property.⁸⁴ If one spouse is guilty of fault, incompetence, neglect or bad faith in the management of community property, the other can demand a judicial separation of property.⁸⁵ The alienation or encumbrance of community property by one spouse without the right to do so is voidable by the other.⁸⁶

While generally the classification of property as either separate or community is not altered significantly,⁸⁷ two major changes in classification concerning personal injury recoveries and fruits and revenues from separate property are instituted. As to personal injury recoveries, Act 627 classifies the portion of the award compensating for injury to the person as the separate property of the injured spouse.⁸⁸ Yet, the portion of the award attributable to loss of earnings is community property.⁸⁹ As to fruits and revenues of separate property, they are classified as community⁹⁰ until the spouse files an authentic declara-

81. LA. R.S. 9:2844 (Supp. 1978), provides:

A spouse who manages a community business without the participation in management of the other has the sole right to acquire, encumber, alienate or lease the movable assets of the business but cannot exercise this right alone if the encumbrance, alienation or lease comprises all or substantially all of the movable assets of the business or affects movables issued or registered in the name of the spouses jointly or the name of the other spouse alone, as provided in R.S. 9:2843 and R.S. 9:2845.

82. LA. R.S. 9:2845 (Supp. 1978), provides: "A spouse in whose name movables are issued or registered as provided by law has the sole right to manage them, encumber, lease or alienate, them."

83. LA. R.S. 9:2844 (Supp. 1978), provides: "A spouse who is a partner has the sole right to alienate, encumber or lease the accompanying partnership interest."

84. LA. R.S. 9:2846 (Supp. 1978).

85. LA. R.S. 9:2856(A) (Supp. 1978).

86. LA. R.S. 9:2846 (Supp. 1978).

87. See generally LA. R.S. 9:2838-39 (Supp. 1978).

88. LA. R.S. 9:2840 (Supp. 1978).

89. *Id.*

90. LA. R.S. 9:2838(5) (Supp. 1978).

tion reserving the fruits and revenues as separate property. After such an act is filed for registry, the fruits and revenues are classified as separate.⁹¹ Present ownership of property classified as community is not changed: "Each spouse owns a present undivided one-half interest in the community property."⁹²

Another significant alteration made by Act 627 concerns obligations contracted by either husband or wife: "Obligations incurred by a spouse before or during the community regime may be satisfied from the community and from the separate property of the spouse who incurred the obligation."⁹³ Without detailing the changes made in present community property law, Act 627 does provide for different options than presently exist on dissolution of the community;⁹⁴ and different rules governing reimbursement between the spouses upon dissolution.⁹⁵

On January 1, 1980, the substantive legislative changes in Louisiana's community property system outlined above will take effect as to all persons presently married, except those with an express marriage contract. The provisions of Act 627 will not affect the characterization of assets or fruits or revenues accruing prior to January 1, 1980, or the validity of any act or transaction made prior to January 1, 1980.⁹⁶

In addition to substantive changes in the community property system, the Act contains provisions which remove the contractual incapacities of husband and wife⁹⁷ and which expand the rights of the spouses to sue each other during marriage.⁹⁸ These provisions, to become effective sixty days after final adjournment of the 1979 legislative session, proved to be the most controversial. The Subcommittee's proposal on the right of the spouses to sue each other during marriage was phrased in terms of full freedom to sue with one exception—damages for personal injury resulting from an unintentional offense or quasi

91. LA. R.S. 9:2839(5) (Supp. 1978).

92. LA. R.S. 9:2838 (Supp. 1978).

93. LA. R.S. 9:2841 (Supp. 1978).

94. LA. R.S. 9:2849-52(D) (Supp. 1978).

95. LA. R.S. 9:2852(E)-2854 (Supp. 1978).

96. 1978 La. Acts, No. 627, § 9.

97. 1978 La. Acts, No. 627, § 3.

98. 1978 La. Acts, No. 627, § 4.

offense.⁹⁹ In the House Committee on Civil Law and Procedure, however, the provision was amended to restore the same prohibitory language that presently appears in Revised Statutes 9:291,¹⁰⁰ but with four additional exceptions.¹⁰¹ With respect to the spouses' ability under Act 627 to change their matrimonial regime by contract at any time during marriage, there was an attempt at each stage in the legislative process to amend section 2834 and only allow the prospective spouses to so contract before marriage, which is presently the law.¹⁰² All such attempts to amend Act 627 were unsuccessful, but in Concurrent Resolution 232 the concern of legislators regarding ability of the spouses to change their matrimonial regime contract at any time is evident.¹⁰³

Since none of the provisions of Act 627 go into effect before September, 1979, Concurrent Resolution 232 was passed to provide a mechanism for interim study by the Joint Legislative Subcommittee and Advisory Committee. The resolution contemplates Law Institute scrutiny of Act 627 and suggestions for

99. La. H.B. 1132, § 4, 4th Reg. Sess. (1978).

100. 1978 La. Acts, No. 627, § 4, provides: "As long as the marriage continues and the spouses are not separated judicially, husband and wife may not sue each other, except for"

101. *Id.*

As long as the marriage continues and the spouses are not separated judicially, husband and wife may not sue each other, except for:

- (1) enforcement of a lawful conventional obligation;
- (2) a loss sustained as a result of fraud or bad faith in the administration of the community property by the other spouse;
- (3) avoidance of an unauthorized alienation, encumbrance or lease of community property;
- (4) judicial authorization to act without the consent of the other spouse

Id.

102. La. Civ. Code art. 2329.

103. La. H.R. Con. Res. No. 232, 4th Reg. Sess. (1978) provides:

WHEREAS, the members of the Legislature have expressed concern about the extent to which spouses should be authorized to contract with each other

. . . .

BE IT FURTHER RESOLVED that the Law Institute is authorized and directed to submit a proposal which would vest the spouses with unlimited right to contract with each other, a proposal which would vest the spouses with the right to contract with each other in specified instances, and a proposal which would prohibit all contracts between spouses.

amendments at the 1979 session of the legislature.¹⁰⁴ Specifically, the Institute is directed to prepare alternative proposals on the spouses' right to contract during marriage.¹⁰⁵ In addition, under the resolution, the Louisiana Bar Association is encouraged to conduct seminars throughout the state to inform members of the Bar about the provisions of Act 627.¹⁰⁶ Activity during this interim year of study is the subject of the last section of this symposium.

104. La. H.R. Con. Res. No. 232, 4th Reg. Sess. (1978) further provides:

BE IT FURTHER RESOLVED that the Louisiana Law Institute is authorized and directed to review the provisions of House Bill No. 1569, the statutes and codes of the state of Louisiana and to make such recommendations, proposals, and codifications as it deems necessary to achieve the policy objectives set forth in House Bill No. 1569 by the Legislature and to review proposed legislation which may be prepared pursuant to this resolution for the purpose of assuring that such proposed legislation utilizes the style and semantics appropriate for inclusion in the Civil Code and the statutes.

BE IT FURTHER RESOLVED that the Louisiana Law Institute shall report all recommendations, proposals, and codifications to the joint subcommittee at least thirty days prior to the convening of the 1979 Regular Session of the Legislature.

105. See note 103, *supra*.

106. La. H.R. Con. Res. No. 232, 4th Reg. Sess. (1978) provides:

BE IT FURTHER RESOLVED that the Louisiana State Bar Association is encouraged to conduct public meetings, conferences or seminars for the purpose of disseminating information relative to the provisions of House Bill No. 1569, receiving recommendations or proposals with respect thereto from the judiciary, lawyers, and other members of the public, and transmitting such recommendations or proposals to the Louisiana Law Institute and the joint subcommittee on or before February 1, 1979.

